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No. 49.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

DONALD I. TILTON, WILFRED L. BECK, JR., and GUY H. McCLEARN, JR.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

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v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

STATUTE INVOLVED.

The provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as Amended, 50 U. S. C. App. 459), which the Court is asked to construe in this case, are as follows:

Reemployment Rights.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * * * *

(B) If such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay;

* * * * * * * *

(C) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such person should—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay;

* * * * * * * *

Service Considered as Furlough or Leave of Absence.

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant

to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

Jurisdiction of District Court; U. S. District Attorney to Act for Claimant.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c) (1), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action:

* * * * * * * *

QUESTION PRESENTED.

When a period of on-the-job training prescribed by a collective bargaining agreement is intended to insure a degree of skill and proficiency and has to be actually

worked in order to qualify for a higher rated position, do Section 9 (c) and (d) of the Universal Military Training and Service Act require an employer to grant such position to a veteran, who does not qualify until after he returns from military service, retroactively as of a date when he could have qualified had it not been for his military service?

STATEMENT OF THE CASE.

The Solicitor General's office, representing the veterans in cases numbered 49 and 53, has filed a composite brief for both cases. While these two cases involve veterans' reemployment rights under the Universal Military Training and Service Act, and are against the same employer, they were filed in different districts, tried before different judges by different counsel, involve different facts and different issues. This brief therefore pertains only to case No. 49. A separate brief will be filed for the respondent in case No. 53.

As indicated by the opinion of the Court of Appeals (R. 105, 106), the facts were stipulated for the most part, and, in any event, the trial court's findings of fact were not challenged by the petitioners in the Court of Appeals, nor are such findings challenged here. Because the petitioners' statement has omitted certain background information and other material facts necessary to a complete understanding of the case, the respondent railroad deems it advisable to make the following statement:

The veterans who are petitioners in No. 49 were originally employed by the railroad as "carman," "helpers" (R. 37, 38 and 39). At the time they left the railroad's employment to perform military service, each was still classified as a carman helper and held seniority only as a carman helper (R. 98).

It is necessary to understand that a helper and a journeyman carman are separate and distinct categories of employees in the railroad's Car Department. As the title implies, the carman-helper is hired to assist the journeyman carman and to do the unskilled or semi-skilled work in connection with repairing and maintenance of railroad cars (R. 94). On the other hand, a journeyman carman, otherwise referred to herein as a carman, is a skilled

craftsman, trained and experienced in all phases of car building and car maintenance. Under Rule 118 of the basic collective bargaining agreement between the railroad and the Brotherhood of Railway Carmen of America, which represented both carmen and helpers, a helper was restricted to the work described therein and had no right to perform carman's work (R. 101).

Separate seniority lists are maintained for helpers and for carmen. Except for the provisions of the December 7, 1953, agreement hereafter described, these veterans as carman helpers had no right to transfer from the helpers' seniority list to the carmen's seniority list, no matter what their experience or skill (R. 58 and 101).

Prior to World War II, the ranks of carmen were filled primarily from apprentices who successfully completed a 4-year training program in all phases of carmen's work (R. 94). Carmen were never hired from the ranks of helpers, who, up to that time, were never allowed to do carman's work and thus to learn the trade. However, when the railroads' car requirements expanded enormously during World War II, while at the same time the supply of skilled carmen was depleted, the railroads found it impossible to fill all carman's positions with qualified carmen. Therefore, the railroads sought and obtained from the union representing the carmen a modification of the basic agreements to permit them to utilize the service of apprentices and helpers for carman's work whenever carmen were unavailable. In order to induce the helpers and apprentices to do the carman's work, it was agreed that after a certain period of actual experience at doing the work of carman, during which these persons would learn the trade sufficiently to qualify as carmen, they would have the right to acquire carman's seniority, if they so elected, provided they gave up their helper's seniority (R. 53, 60).

During the war and until May of 1947, the minimum period established by agreement for the qualification of a helper as a carman was three years of actual experience working as a carman (R. 98). Then there was an interval from 1947 until the 1953 agreement when no agreement was in effect giving helpers any right to become carmen. However, during that interval they were permitted to work as carmen, and under Rule 116 of the Basic Agreement, could be found qualified after four years of experience in doing carman's work and the carrier at its election could hire them as carmen. In either case, if they elected to take carmen's seniority, they would start at the bottom of the carman's seniority list (R. 98). Finally, on December 7, 1953, the railroad and the union arrived at the agreement with which we are primarily concerned in this case (R. 99). It is the terms of this agreement which create any rights which these veterans may have to a carman's seniority.

It was during the interval from 1947 to 1953 that petitioners Tilton and McClearn left their railroad employment in order to perform military service. At that time, neither one had completed the 4-year work requirement for qualification under the provisions of Rule 116 of the Basic Agreement (R. 100). At that time Tilton had done carman's work only 145 days and McClearn only 21 days (R. 100). These two veterans returned to their employment with the railroad prior to the effective date of the 1953 agreement.

Petitioner Beck did not leave for military service until 1955. At the time he entered military service, he had accumulated a total of 851 days' work as a temporary carman (R. 100).

The December 7, 1953, Agreement.

The agreement is set out in full at pages 42 to 46 of the Record. It established a system for using apprentices and helpers to perform carman's work "when the carrier is unable to employ qualified carmen" (R. 42). The system set up a priority order in which various classes could be used to do carman's work, to-wit: (1st), truckmen; (2nd), regular apprentices who have served 520 days of apprenticeship; (3rd), helper apprentices; and (5th), helpers, first choice to be made from helpers with two or more years of service.

Secondly, the agreement provided that helpers to be advanced or upgraded to carman's positions would be selected jointly by the master mechanic or superintendent of the railroad, and the local committee of the union (R. 43). This selection of helpers for upgrading was to be made from those "who are qualified for advancement" (R. 43). By such qualification the parties intended aptitude for learning the trade and skills of carman. Therefore, the upgrading of a helper did not imply that the helper so selected was considered a qualified carman (R. 100). As a matter of practice, selection of helpers for upgrading was not always in seniority order (R. 100).

Third, helpers who were selected for upgrading under this agreement were to retain their seniority as helpers and acquire no seniority as carmen (R. 44). This meant that at any time after they were upgraded, they could exercise their seniority rights as helpers to take any helper's position that was available and they were not required to take carman's work. As a matter of fact, a helper's position was sometimes preferred because it may be in a better location, with better hours, and perhaps have more overtime pay (R. 79 and 82).

Fourth, apprentices and helpers who were upgraded for carman's work were listed in the date order of their

upgrading. While this upgrading date had some of the attributes of seniority, the agreement expressly negatived any implication that it was a seniority date (R. 44, Section 2). The effect of this date is stated in Section 5 (R. 45), which gave the upgraded men who made application for carmen's vacancies the right to be assigned to such vacancies in the order of their position on the upgraded list, provided there were no bids from qualified carmen.

Fifth, it was expressly provided that helpers who had been upgraded would retain their position on the upgraded list while they were in the armed services (R. 45, Section 4 (c)).

Sixth, the most significant feature of the agreement was the following which is worth quoting:

> "A helper who is later advanced to carman will retain seniority as helper. When he has completed a total of 1,040 days of service as carman, he shall be considered as a qualified carman. At the completion of 1,040 days of service, he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement" (R. 44).

The 1,040 days' work requirement established by the above quoted rule, like the 4-year work requirement in Rule 116 of the Basic Agreement, was intended by the parties as a period of on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under these contracts, at least from the time any of the petitioners were first upgraded, was in accord with that intention (R. 100).

Pursuant to the 1953 agreement, the defendant kept an actual record on each upgraded helper of the days he worked in a carman's position. When a helper had accumulated 1,040 days of work in a carman's position, he was notified by the railroad so that he could make his election between his helper's seniority and a carman's seniority. If he chose a carman's seniority, he was placed at the bottom of the carman's seniority roster (R. 99).

Upon completion of their military service, the veterans were restored to their previous position as carman helpers without loss of seniority, and each was also temporarily advanced to the position of carman, in accordance with his position on the upgrading list, because of the continued shortage of carmen (R. 98). They continued working in a carman's position until they were notified that they had accumulated a total of 1,040 days of work in such positions (including days so worked prior to their military service) and upon being so notified, they elected to relinquish their helper's seniority and to take a carman's seniority as of that date. The defendant thereupon accorded each of these veterans seniority dates on the carman's seniority list as of the date following completion of the 1,040-day work requirement (R. 100).

The petitioners' statement on page 8 of their brief that "in their absence many men junior to them were permitted to 'jump' petitioners in seniority" is inaccurate and misleading. Petitioners **held no seniority as carmen** when the men junior to them on the helpers' list transferred to the carmen's list pursuant to the 1953 agreement. Therefore, these men could not "jump" or go around petitioners on the carmen's seniority list.

On the basis of the foregoing facts, the District Court and the Court of Appeals concluded, on the authority of this Court's opinion in the **McKinney** case, that the

veterans' transfer or promotion to the position of carman from the position of helper was not automatic and would not necessarily have occurred as a matter of right prior to the time when the junior upgraded men became qualified for promotion. The courts below concluded that the showing of high probability of promotion, had the veterans continued in their employment, does not meet the burden of proving that promotion was a matter of automatic progression. Judgment for the defendant was entered by the District Court and affirmed by the Court of Appeals, reported at 306 Fed. 2d 870.

SUMMARY OF ARGUMENT.

Section 9 of the Universal Military Training and Service Act grants to veterans the right to be restored to their former position without loss of seniority and with such rights as have attached to that position while they were on leave of absence. Section 9 (c) (2), enacted in 1948, does not create new rights but merely incorporates the escalator principle which the Supreme Court in the **Fishgold** case had applied to identical provisions of the 1940 Act. Under that principle, an employee on leave of absence from his job, whether in military service or otherwise, accumulates seniority, and upon his return is entitled to whatever rights have attached automatically to his position during his leave of absence. He can claim these rights upon his return. He cannot, however, claim any rights which, under the collective bargaining agreement and practice existing at his place of employment, are contingent upon proof of fitness and ability, or upon attainment of a certain skill and proficiency. **McKinney v. MKT**, 357 U. S. 265.

Where, as in the present case, the collective bargaining agreement and practice thereunder require that an employee successfully complete a prescribed period of on-the-job training, designed to increase his skill and proficiency, before he is considered fit and able to qualify for promotion, Section 9 does not grant a right to claim such fitness and ability retroactively. In such circumstances promotion is not dependent "simply on seniority or other form of automatic progression." Nor can an employee on leave of absence, including employees in military service, be given credit toward such requirement while on leave of absence, because during that period they cannot be acquiring increased skill or proficiency.

The veterans here have admitted that in order to be qualified for promotion they must first successfully com-

plete the required period of training. They have also admitted, and the Court has found, that even if they had been working, promotion would not have been automatic but, on the contrary, would have been contingent upon variable factors. Thus promotion was not in seniority order. It was a matter of meeting the agreed test of skill and proficiency by completing the required training period and then affirmatively exercising a choice between helpers' seniority and promotion to carman.

The veterans have been granted seniority as a carman as of the time they earned the right to be promoted to carman, strictly in accordance with the provisions of the collective bargaining agreement and practice thereunder. Their reemployment rights have not been violated.

ARGUMENT.

I. Where a period of on-the-job training must be actually worked in order to qualify for promotion to a higher position, Section 9 of the Universal Military Training and Service Act does not grant returning veterans a right to such position until they have so qualified, even though they probably would have qualified earlier had they been able to continue working during their period of military service.

This case requires a construction of Sections 9 (c) and (d) of the Act as applied to the particular circumstances here presented. The Supreme Court has not previously been presented with similar circumstances. Since the case turns on the language of the statute and the intention of Congress in using such language, we again quote pertinent portions of Section 9 and discuss each subsection separately.

A. Subsection 9 (b) requires restoration to position previously held.

Subsection 9 (b) provides, in part, as follows:

> "(b) In the case of any such person who, in order to perform such training and service, has left or leaves a **position** (other than a temporary position) in the employ of any employer * * *.
>
> "(B) if such position was in the employ of a private employer, such person shall—
>
> "(i) if still qualified to perform the duties of such position, **be restored** by such employer or his successor in interest **to such position** or to a position of like seniority, status and pay; * * *."

With respect to the provisions of Section 9 (b) (B) it should be emphasized that this subsection gives the return-

ing veteran the right to be restored only to such position as he held when he went into military service; it does not grant him any right to any different position or classification.

In the case of **Fishgold v. Sullivan Dry Dock and Repair Corp.**, 328 U. S. 275, 90 L. ed. 1230, which is the leading case construing the similar provisions of the 1940 Act, the Court said:

> "He must be restored to his former position 'or to a position of like seniority, status and pay.' Section 8 (b) (A), (B). He is thus protected against receiving a job inferior to that which he had before entering the armed services. (l. c. 284.) • • •
>
> "The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority." (l. c. 287.)

It is clear that the Supreme Court did not construe Section 8 (b) of the 1940 Selective Training and Service Act as granting to the veteran any right to be restored to a classification or position different from the position held when he left his employment.

In other words, disregarding other provisions in the Act, this subsection does not give to these veterans any right to any position other than the helper positions and the positions on the upgrading list, which they occupied when they left for military service. These positions they admittedly received (R. 98).

B. Subsection 9 (c) (1) treats the veteran as having been on leave of absence.

Subsection 9 (c) (1) provides in part:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or

(B) of Subsection (b) shall be **considered as having been on furlough or leave of absence** during his period of training and service in the Armed Forces, shall be so **restored without loss of seniority,** shall be entitled to participate in insurance or other benefits offered by the employer pursuant to establish rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, * * *"

It will be noted that this subsection grants to the veteran three separate rights **upon his restoration to his previous position,** to-wit:

1. The veteran shall be considered as having been on furlough or leave of absence while in the military service.

2. He shall be restored without loss of seniority.

3. He is entitled to any other benefits offered by the employer relating to employees on furlough or leave of absence.

These three rights apply only to the veteran's status in the position previously held, the position to which he is to be restored. They insure against any loss of seniority in that position, and assure the veteran only such rights and benefits as would accrue to employees who are on leave of absence from their jobs. Nothing in this subsection requires that veterans be considered as though they had continued to work.

These veterans were restored to their positions without any loss of seniority or other benefits accruing to employees on leave of absence (R. 98). They do not contend otherwise.

C. Subsection 9 (c) (2) is a reaffirmation of the escalator principle.

Not having any basis for their claim in Subsections 9 (b) (B) or 9 (c) (1), these veterans are relying entirely on Subsection 9 (c) (2). They contend that the provisions of this subsection require the employer to give them such status or position as they might have earned if they had been able to continue on the job during their period of military service, even if this requires giving them a new position never before held by them.

Subsection 9 (c) (2) provides as follows:

> "It is hereby **declared to be the sense of the Congress** that any person who is restored to a position in accordance with the provisions of Paragraph (A) or (B) of Subsection (b) **should be so restored** in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the Armed Forces until the time of his restoration to such employment."

1. Section 9 (c) (2) Is Not Mandatory.

The first hurdle they must get over is the precatory language in which this subsection is couched. It will be noted that in this subsection, Congress very deliberately chose to use the terms, "It is declared to be the sense of Congress" and "should be so restored," instead of the language used in the preceding subsections, to-wit: "Such person shall be restored" and "shall be considered" and "shall be entitled." It seems obvious that the difference in language used in 9 (c) (2) indicates Congress' intention that it operate in a manner different from the preceding subsections. By comparing the language in 9

(c) (2) with the language in 9 (b) (C), one can only con
clude that Congress did not intend 9 (c) (2) to be an
enforceable obligation.

9 (b) (C) has language similar to 9 (c) (2):

> "If such position was in the employ of a state o
> political subdivision thereof, **it is declared to be the
> sense of Congress** that such person **should** * * * re
> stored * * *."

There can be no doubt that Congress used this precatory
language in 9 (b) (C) because it did not intend to mak
it an enforceable obligation that the states reemploy
veterans. It has been so held in the cases of **McLaughlin
v. Retherford**, 207 Ark. 104, 184 S. W. 2d 361 (Ark. 1944)
and **Rutherford v. City of Nashville**, Tenn. Court of Ap
peals, March 27, 1948, 21 L. R. R. M. 2618, 14 Labor Case
(C. C. H.), No. 64,413. Likewise, the Bureau of Veteran
Reemployment Rights, which is in charge of enforcing re
employment rights under the Act, has so construed thi
language. In its Reemployment Rights Handbook (rev
1954), Question and Answer No. 28 read as follows:

> Q. What protection do employees of states and thei
> local and municipal subdivisions have under the Uni
> versal Military Training and Service Act?
>
> A. The Universal Military Training and Servic
> Act contains no mandatory provisions covering such
> employees. However, it is declared to be the sens
> of Congress that employees of states, or politica
> subdivisions thereof, should be restored to their posi
> tions. * * *

It is highly appropriate therefore to ask the Bureau and
the veterans: If the language is not mandatory as used i
Section 9 (b) (C), why should the same language be con
sidered mandatory when used in 9 (c) (2)?

The fact that Congress did not intend 9 (c) (2) to be mandatory is clearly proven by the amended language of Section 9 (d), the enforcement section. At the time Congress passed the Selective Service Act of 1948 and added Subsection 9 (c) (2) to the previous section on reemployment rights, **it did not** at the same time amend 9 (d) to **provide for the enforcement of 9 (c) (2).** On the contrary, it amended 9 (d) as follows:

> "In case any private employer fails or refuses to comply with the provisions of **subsection (b) or subsection (c) (1)** or subsection (g), the District Court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of **such provisions,** specifically to require such employer to comply with such provisions. * * *"

It will be noted from this language that the District Court is not given any jurisdiction to require the employer to comply with Subsection (c) (2). How then can the Courts require the employer to comply with (c) (2), even if it means what these veterans say it means?

2. **Section 9 (c) (2) Does Not Mean Continued Working.**

Assuming that the veterans get over the hurdle that Section 9 (c) (2) is not an enforceable obligation, the second hurdle they must get over is the fact that in using the words "if he had continued in such employment continuously," Congress apparently did not intend that he must be considered as if he had continued working on the job. The legislative history of this subsection is exceedingly illuminating.

When Section 9 (c) (2) was enacted in 1948 as part of the Selective Service Act of 1948 (Act of June 24, 1948, Chapter 625, Title 9, Section 9, 62 Stat. 614), it followed

the language of Senate Bill 2655. In its report on that bill, the Senate Committee on Armed Services in Senate Report No. 1268 reported to the Senate as follows:

"Section 9. Separation from service; reemployment rights.

This section, which contains 11 subsections, is similar to, but not identical with, section 8 of the 1940 act. The committee has taken the position that, as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act. **For that reason no important substantive changes have been made in the provisions of the 1940 act.** Several procedural changes, which seem to be justified by past experience, have been introduced." (Emphasis added.)

* * * * * * *

"(c) Benefits which accrue to the individual during his absence. (1) Benefits to which entitled: This paragraph reenacts section 8 (c) of the 1940 act. It preserves certain benefits, incident to Federal or private employment, to which persons are restored after completion of service, such as accumulated seniority rights and insurance benefits. In addition, the paragraph prohibits the individual's being discharged or laid off without cause within 1 year after restoration. (2) **Statement of policy regarding application of the 'escalator principle'**: The provisions of this legislation differ from those contained in the Selective Training and Service Act of 1940, as amended, in that it is specifically stated to be the intent of the Congress that persons restored to Federal or private employment be restored so as to give them the status which they

would have enjoyed if they had remained in such employment continuously during the time of their service in the armed forces."

(The complete Senate report concerning Section 9 is found in the Appendix, page 41.)

The language of the House bill differed considerably from the language of the Senate bill which was finally adopted. House Bill 6401, Section 8 (d), provided, in part, as follows:

"(d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, **shall be entitled to all promotions, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to which he would have been entitled had he been working for the employer during his period** of service in the armed forces, * * *"

(The complete language of Section 8 of the House bill is printed in the Appendix at page 45.)

The Conference Committee which met to resolve the differences between the Senate bill and the House bill chose to adopt the language of the Senate bill with respect to reemployment rights. The complete report of the Conference Committee with respect to reemployment rights is printed at page 43 of the Appendix.

The significant fact that Congress rejected the specific language of the House bill giving veterans the right to all promotions, etc., which they would have had if they had been **working** in their old positions indicates more clearly than anything else that Congress had no intention of requiring that the veteran must be treated as if he had been

steadily working on his job during his period of military service and be given all the advantages which would have accrued to him on that assumption. Yet the veterans here are basing their case entirely on the proposition that if they had been working steadily on their job during their period of military service, they would have been entitled to promotion at an earlier time. They are trying in this case to persuade the Court to give them rights which Congress deliberately decided not to give them.

3. Section 9 (c) (2) Reaffirms the Escalator Principle, Not as a New and Independent Right, But as a Guide to the Application of Section 9 (c) (1).

Assuming, therefore, that Section 9 (c) (2) was not intended to require that veterans be treated as if they had been working on the job, the next question is, what effect did Congress intend it to have?

It will be noted from the report of the Senate Committee that in its view, "No important substantive changes have been made in the provisions of the 1940 Act," and that Section 9 (c) (2) was intended as a "statement of policy regarding the escalator principle." At the time this amendment was enacted, there was nothing in any of the decisions of the Supreme Court construing the 1940 Act which indicated that this Court thought the employer must treat the veteran as though he had been actually on the job during his period of military service, rather than treating him as having been on furlough or leave of absence. The statement of policy of the Senate Committee regarding application of the escalator principle had obvious reference to the Supreme Court's decision in the **Fishgold** case, which had first announced that principle when interpreting the language of Section 8 (c) of the 1940 Act. This section was re-enacted without change as Section 9 (c) (1) of the present Act.

It is obvious from reading the **Fishgold** case that the Court there did not intend the escalator principle to mean that a veteran be treated as if he had been working continuously on the job. The Court said only that—

> "A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. Section 8 (c) of the Act recognizes that insurance and other benefits may continue to accrue to an employee on furlough or on leave of absence. **An employee on furlough or on leave of absence has a continuing relationship with the employer;** he retains a right to be restored to work under specified conditions" (328 U. S. 275, l. c. 287).

If, as contended by these veterans, we construe the words "in such employment continuously" as used in Section 9 (c) (2) to mean actually **working** continuously in such employment, then we have an irreconcilable conflict between Subsections 9 (c) (1) and 9 (c) (2). It is obviously impossible for a man to be on furlough or leave of absence from his employment, and at the same time to be actually working at his job. Surely the decision of the Supreme Court in the **Diehl** case does not mean that the Court failed to recognize this obvious fact. An employee on furlough or leave of absence may accumulate seniority and may acquire other rights during his absence, but he cannot be acquiring the experience and training or the increased skills which result only from actually working at his job. Therefore, in order to construe these two subsections so that they can be consistent with each other, it is necessary to find some other meaning for the words "in such employment continuously."

It is of course a cardinal principle of statutory construction that, where at all possible, different sections of a statute must be construed so as to be consistent with each other. Citations are deemed unnecessary.

The words in 9 (c) (2) can be reconciled with those of 9 (c) (1) by treating the veteran as if he were on furlough or leave of absence while at the same time he continues his employment relationship with his employer. Such relationship normally continues during furlough or leave of absence; the absent employee is still considered an employee and is retained on the seniority list during his absence. He does not lose any right to which his seniority entitles him.

Therefore, in the light of its legislative history, as well as simple logic, we submit that Section 9 (c) (2) was not intended to create additional rights, but was intended only to reaffirm the rights previously granted by Section 8 (c) of the 1940 Act, as it had been interpreted by the Supreme Court in the **Fishgold** case. It was intended solely as a guide to the Courts in the interpretation of Section 9 (c) (1) to insure that 9 (c) (1) would be interpreted the same way as the former Section 8 (c).

D. **The escalator principle, as it has been recognized in Supreme Court decisions, requires that the veteran be granted only such rights as ordinarily result from accumulated seniority while on leave of absence, independently of fitness and ability.**

We find no indication in the Supreme Court's opinions that in announcing the so-called "escalator principle", it intended to create any new rights for veterans. In the **Fishgold** and subsequent cases, it was construing the leave of absence test of Section 8 (c) in the 1940 Act, or Section 9 (c) (1) of the 1948 Act. It recognized that seniority rights and other rights of employees are not

terminated when they are on a leave of absence; that in the normal employment situation such absent employee remains on the seniority roster, continuing to accumulate seniority while absent; that during his absence, additional rights may be created which benefit those who are on leave of absence in common with those who remain at work. The Supreme Court correctly held, therefore, that upon the employee's return to work, "he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." 328 U. S. 275, 284.

In the case of **Trailmobile v. Whirls**, 331 U. S. 40, the Court recognized that, with respect to job rights, being on furlough and leave of absence may be synonymous with being continuously employed. Thus in describing the rights of the returning veteran, the Court said:

> "He was to be restored and kept, for a year at least, in the same situation, if he had not gone to war but had remained continuously employed or had been on 'furlough or leave of absence'." l. c. 58.

In other words, the escalator principle treats the employee as on furlough or leave of absence but grants him accumulated seniority and gives him whatever rights and benefits accrue to employees with such seniority. It does not, however, give him rights which depend upon fitness and ability, whether such fitness and ability is a matter of employer discretion or is a matter of actual work experience. The **McKinney** case settled this interpretation of the escalator principle as embodied in 9 (c) (2).

McKinney v. M-K-T, 357 U. S. 265, 2 L. ed. 2d 1305.

The plaintiff in this case was classified and held seniority in a "Group 2" clerical position when he left for

military service. In his absence, a "Group 1" position was bulletined, and in the absence of applications from Group 2 employees, a new employee was hired to fill the position. McKinney claimed that, upon his return from military service, he should receive a seniority date in the Group 1 position as of the date the position was bulletined. The applicable contracts provided:

> "Promotion will be confined to the group * * * with the exception that employees on positions enumerated in Group 2 will be given preference over non-employees in the assignment to the positions in Group 1, based on fitness and ability. * * * An employee returning after leave of absence may return to former position or may upon return exercise seniority rights to any position bulletined during such absence."

The Court held that the plaintiff was not entitled to the Group 1 position merely because he might have bid on it and might have been given the position. The Court laid down the following tests:

> "Section 9 (c) (1) states that he shall be restored 'without loss of seniority.' In Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 285, 90 L. ed. 1230, 1239, 1240, 66 S. Ct. 1105, 167 A. L. R. 110, and Oakley v. Louisville & N. R. Co., 338 U. S. 278, 283, 94 L. ed. 87, 91, 70 S. Ct. 119, the same provision in an earlier act was interpreted to mean that a returning veteran does not step back at the exact point he left his employment, but rather is entitled to 'a position which, on the moving escalator of terms and conditions affecting that particular employment would be comparable to the position which he would have held if he had remained continuously in his civilian employment.' 338 U. S. at 283. This interpretation is now embodied in Sec. 9 (c) (2) of the present Act.

"However, **Section 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute.** Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and **advancements in status that would necessarily have occurred simply by virtue of continued employment** will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained **as of right**, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

"Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, **not simply on seniority or some other form of automatic progression**, but on the exercise of discretion on the part of the employer." 357 U. S. 265, 270. (Emphasis added.)

Thus it is clear that rights which do flow from experience and effort, rather than from seniority, are not encompassed by the escalator principle. An employee on leave of absence cannot acquire such rights. Only those rights which accrue to all employees within the same seniority class, whether or not on leave of absence, can be claimed by the returning veteran. So where a right of promotion is not dependent solely upon accumulated seniority or similar automatic progression, but on accumulated experience and proficiency, as in this case, the

escalator principle embodied in Section 9 (c) (2) does not grant such right to the returning veteran.

This interpretation of the escalator principle, even prior to the **McKinney** case, was supported by many decisions from the several Courts of Appeals.

Railroad Cases.

Jefferson v. ACL, 303 F. 2d 522 (C. A. 5, 1962);
Sulars v. MStP&SS, 259 F. 2d 122 (C. A. 8, 1958), Affg. 148 F. Sup. 83;
Bassett v. Texas Pacific, 258 F. 2d 819 (C. A. 5, 1958);
Poor v. L&N, 235 F. 2d 687 (C. A. 5, 1956);
Bostian v. Seaboard Air Line, 211 F. 2d 867 (C. A. 4, 1954);
Raulins v. Memphis Union Station, 168 F. 2d 466 (C. A. 6, 1948);
Boston & M. v. David, 167 F. 2d 722 (C. A. 1, 1948);
Hewitt v. System Federation, 161 F. 2d 545 (C. A. 7, 1947);
Gregory v. L&N, 92 F. Supp. 770, Affd. Per Cur. 191 F. 2d 856 (C. A. 6, 1951), Cert. Den. 343 U. S. 903.

Non-Railroad Cases.

Horton v. U. S. Steel, 286 F. 2d 710 (C. A. 5, 1961);
Lipscomb v. Tennessee Coal, 189 F. 2d 708 (C. A. 5, 1951);
Altgens v. Associated Press, 188 F. 2d 727 (C. A. 5, 1951);
Special Service v. Delaney, 172 F. 2d 16 (C. A. 5, 1949);
Nevins v. Curtiss Wright, 172 F. 2d 535 (C. A. 6, 1949);
Trischler v. Universal Potteries, 171 F. 2d 707 (C. A. 6, 1948), Affg. 78 F. Supp. 609.

All of these cases denied the veteran a promotion to a higher rated job after his return because he could not

show that such promotion would have been granted solely on the basis of accumulated seniority.

The petitioners on page 23 of their brief have mentioned the cases of **Mann v. Crowell-Collier Publishing Co.**, 239 F. 2d 699 (C. A. 6), and **Borges v. Art Steel Co.**, 246 F. 2d 735 (C. A. 2). These cases do not support their position. In the **Mann** case, a period of six years' training for apprentices was required at the time the plaintiff went into military service. During his absence, this training period was reduced to five years. Upon his return, the employer voluntarily or by reason of an existing agreement granted him retroactive seniority, but based it upon the six-year requirement instead of the new five-year requirement. The Court held that the veteran was entitled to such seniority on the five-year basis. This decision is no authority for the granting of retroactive seniority on an involuntary basis. It could have been based solely on the principle that the veteran is entitled to the benefit of any changes in agreements made in his absence.

In the **Borges** case, returning veterans were held entitled to the benefit of wage increases negotiated during their absence, which the agreement gave only to employees with a certain number of days of working service. The basis of the Court's decision is shown in this quotation:

> "Where pay increases or promotions are awarded on the basis of skill or merit, and not on the basis of the mere passage of time, they cannot be regarded as the fruits of seniority, e. g., Addison v. Tennessee Coal, Iron & R. Co., 5 Cir., 204 F. 2d 340; but **here the only requirement for the increase was to have actually been on the job for a length of time.** Inasmuch as these eleven plaintiffs were employed as laborers and the increases reached all employees of all degrees of skill, there can be no serious contention

that the requirement of actual service was designed to reward proficiency acquired through experience, rather than mere seniority."

The Diehl Case Distinguished.

Petitioners rest their case primarily on the per curiam decision by the Supreme Court in **Diehl v. Lehigh Valley**, 348 U. S. 960, 99 L. ed. 949, decided March 14, 1955, reversing the decision of the Third Circuit, reported at 211 F. 2d 95. The fact that the Supreme Court offered no explanation for this reversal, except to cite the **Oakley** case, 338 U. S. 278, makes it somewhat difficult to know what the Supreme Court had in mind. The **Oakley** case decided nothing more than a veteran's right to reemployment beyond one year. The Court's opinion, however, stated that the veteran is entitled to be restored to "a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment." (Citing **Fishgold.**) This language of the Court in the **Oakley** case does no more than reaffirm the escalator principle of the **Fishgold** case. It does not support the construction of 9 (c) (2) contended for by the veterans.

The **Diehl** case was decided solely on the pleadings. The trial court had dismissed Diehl's complaint on motion and the Court of Appeals affirmed, holding that the facts alleged in the complaint did not show a violation of his reemployment rights. The facts alleged, as reported in 211 F. 2d, were as follows:

Diehl was employed as a carman-helper in 1942. In 1943, because of the shortage of qualified carmen, he and other helpers were upgraded and worked as carmen. Shortly after he was upgraded, he went into military service. At that time, there was no agreement regarding the

seniority status of upgraded helpers. In 1944 the railroad and the union agreed that they would determine the seniority status of upgraded helpers after the war was over. Diehl returned to work in 1945 and worked as a carman until March, 1949, at which time the railroad and union made an agreement. This agreement provided: "A carman-helper, who has qualified as a carman-mechanic, and is presently working on position of a temporary carman-mechanic on the effective date of this agreement, shall be given the opportunity to make an election within 15 days after the date of his being notified of having worked 1,160 days as a temporary carman-mechanic" to take a carman's seniority as of the date of the agreement and to forfeit his helper's seniority. The agreement further provided that those who elected a carman's seniority were to rank on the seniority list in the order in which they had completed 1,160 days as temporary carman. Diehl completed his 1,160 days on January 10, 1949. The complaint alleged and the Court, therefore, had to assume in ruling on the motion that if he had not been in military service, **Diehl would have completed his 1,160 days on June 1, 1946, and would have ranked ahead of four other helpers** who completed their 1,160 days after that date.

The District Court and the Court of Appeals held, under Section 8 (c) of the 1940 Act, Diehl must be treated as if he had been on leave of absence and not as if he had been continuously employed. The Court construed the words "continuously employed" in Section 9 (c) (2) of the 1948 Act as the equivalent of "continuously at work." It, therefore, found that there was an inconsistency between the provisions of 9 (c) (1) and 9 (c) (2). It chose to follow 9 (c) (1) because of the fact that it was mandatory whereas 9 (c) (2) was not.

When the case was presented to the Supreme Court, the only question for it to decide was whether the Appellate

Court had been correct in completely rejecting the continuous employment test. While we cannot determine what actually decided the Court, we assume that its reversal of the 3rd Circuit indicated only that the continuous employment test was not inconsistent with the leave of absence test. But if that is the correct interpretation of the ruling, then it necessarily follows that "continuous employment" was not, in the mind of the Court, equivalent to "continuous working," but was equivalent to "continuously employed," or "continuously in an employment relationship." As we have pointed out, working on a job in St. Louis or Kansas City is necessarily inconsistent with fighting a war in North Korea. A veteran cannot be treated as if he were doing both at the same time.

If the Supreme Court had intended by its per curiam decision to establish the new principle urged by petitioners, and to overrule the decisions in the appellate courts, it would surely have furnished a complete explanation of its ruling in an opinion.

A most enlightening and thorough analysis of the **Diehl** case was made by Professor Herbert L. Sherman, Jr., Professor of Law, University of Pittsburgh, in an article entitled "Seniority and Promotion Rights of Reemployed Veterans," 17 Pitts. L. R. 20 (1955). This article is reprinted in the Appendix, page 48. Among other very pertinent observations, Professor Sherman said this:

> "If counsel for the veteran and counsel for the company and union agree that mere passage of time is sufficient to qualify an employee for a higher status, as **was the position of counsel, in effect, in the Diehl case in arguing before the Supreme Court**, then the Court should clearly rule that service in the Armed Services may be substituted for service in the plant. On the other hand, where experience on the job is the gist of the practice and the contractual requirement,

the Courts should not substitute military service for the necessary experience. By deciding the Diehl case in one sentence, the Supreme Court would seem to have left prior law on this question undisturbed."

Unlike the present case, there was no evidence and no finding by the Court that the work requirement was intended to be and was in actual practice treated as a period of training, successful completion of which was the agreed test of skill and proficiency. For all that appears in the **Diehl** case, the requirement may have been met solely by the elapse of 1,160 days time from the date Diehl was first upgraded to carman, and he may have been considered a qualified carman when first upgraded.[1]

II. Under the controlling agreement and the other facts of this case, the period of on-the-job training must be actually worked and successfully completed before a helper was considered sufficiently skilled for promotion to carman. Promotion was not dependent simply on seniority or other form of automatic progression.

A. The controlling agreement and practices thereunder required, as the test of fitness and ability, that a helper accumulate a total of 1,040 days of actual work as a carman, before he could claim a right to promotion. An employee on leave of absence could not count the time on leave as time actually worked.

The findings of the District Court, together with admissions made by petitioners, conclusively establish the fact that the agreement of December 7, 1953, prescribed a period of on-the-job training which had to be actually worked in order for these veterans to qualify for promo-

[1] If so, the case was similar to the case of *Spearman v. Thompson* (C. A. 8 1948), 167 F. 2d 626.

tion and acquire any rights to promotion to the position of carman. Finding No. 9 of the District Court shows that when a helper is first selected for temporary upgrading to carman's work, he is not considered a qualified carman at that time; he is considered only to have sufficient aptitude for learning the trade and acquiring the skills required of a carman (R. 99). Finding No. 10 of the District Court establishes that the 1,040-day work requirement was intended by the parties as a period of on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under the contract was in accord with that intention. Upgraded helpers were required to complete 1,040 days of work in a carman's position before they were considered sufficiently skilled to be promoted to the position of carman (R. 100).

These petitioners have admitted in their briefs that they had to successfully complete the prescribed period of on-the-job training, and that this was a condition precedent to their acquiring any carman's seniority. Thus, on page 22 of their brief, they state:

> "A returning veteran cannot claim a promotion that depends solely upon completing a prerequisite period of employment training unless he first works out that period."

The successful completion of the work requirement was the agreed test of fitness and ability to become a carman. In **McKinney**, the veteran was denied a retroactive promotion primarily because he could not show that the employer in its discretion would necessarily have found him fit and able as of the date he claimed. The fact that he was later promoted to Group 1, and that the former uncertainty as to his fitness and ability had been removed, was not sufficient proof of his qualification as of an earlier date.

Here, too, the veterans cannot prove fitness and ability until they have passed the agreed test. They did not do so until the day before they were promoted, and the fact that they might have done so earlier is too uncertain a basis for requiring that they be given a retroactive date.

B. Qualification for promotion was independent of seniority, and therefore the veterans had no contractual right to be promoted ahead of any junior man, even if they had remained on the job.

The original complaints filed in these cases alleged that the veterans would have qualified for the position of carman on a certain date, to-wit, Tilton on April 1, 1953 (R. 6), Beck on December 5, 1955 (R. 7), McClearn on April 20, 1956 (R. 8). In their second complaints they alleged that they would have completed 1,040 days of carman's work "before the date when the first carman-helper upgraded after him or junior to him completed 1,040 days' work," and "that he would have then elected carman's seniority" (R. 14, 19, 25).

In order to prove these allegations, the plaintiffs offered evidence to show that had they been working during the period of their military absence, they would have chosen at all times to do carman's work whenever such work was available, and that after successful completion of 1,040 days of such work, they would then have elected to give up their helper's seniority to take a carman's seniority. They tried to show that promotion would have necessarily been granted to them before it was granted to any junior upgraded man. After a full trial, however, the Court found the facts against the plaintiffs. The Court found that helpers temporarily upgraded to carman's positions under the 1953 agreement had no guarantee that they would ever complete the 1,040-day work requirement. The evidence showed that many helpers so upgraded have

never completed the work requirement (R. 65). Whether they would have completed, and when they would have completed it, depended on a number of variable factors, among which were (1) lay-offs due to illness or reductions in force, (2) continuing unavailability of enough carmen to fill carmen's positions, and (3) continued satisfactory work by the helper in his upgraded position (R. 101).

The Court further found:

1. That it was uncertain whether plaintiffs would have worked as carmen on every date that such work was available to them (R. 101). The evidence showed that some men did not (R. 79 and 82).

2. It was uncertain whether these veterans would have elected to relinquish their helper's seniority upon completion of the work requirement. The evidence again showed that some men did not (R. 81).

3. It was also uncertain whether plaintiffs would have completed the work requirement prior to the next upgraded helper. The evidence showed that the completion of the work requirement was not always in the order of upgrading (R. 73).

Because of these and other uncertainties as to when the veterans would have been promoted had they continued to work, the Court concluded that promotion was not a matter of seniority or some other form of automatic progression (R. 102, 103). As noted by the Court of Appeals in its opinion (R. 110), the veterans "do not contest the existence of various conditions or uncertainties surrounding the completion of their 1,040 days actual work on the job * * * There is indeed nothing 'automatic' about their completion of the work requirement." In spite of these admissions in their appellate court brief and in spite of findings by the Court that there were un-

certainties surrounding completion of the work requirement and that such completion was not automatic, the veterans are still contending here that they were entitled to a seniority date as of the date when they would have completed the work period had they remained continuously in civilian employment. (Pet. Brief, p. 5.)

The trouble with their contention is that it flies right in the face of the decision in **McKinney** to the effect that where promotion is dependent upon fitness and ability, measured in this case by actual experience on the job, rather than on seniority or other form of automatic progression, the veteran cannot claim such promotion retroactively on his return. The facts found by the District Court show conclusively, as far as this Court is concerned, that promotion to carman was not a matter of seniority and that such promotion was not necessarily in seniority order.

When the District Court and the Court of Appeals held that promotion to carman was contingent on variable factors which could not be made certain retroactively, what they meant was that because of such contingencies, advancement would not **necessarily** have occurred as of right simply by virtue of continued employment. The District Court concluded therefore that "a showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression" (R. 103).

The railroad contends that the Act does not require it to assume that these veterans were actually working and acquiring experience on the job during the period of their military service, but even if we are required to make such assumption, we cannot assume that the right to promotion which depends on factors other than seniority will be acquired in seniority order as claimed by these veter-

ans. For example, if these veterans had remained on the job and at any time had taken a leave of absence on account of illness or other personal reasons, or had chosen at any time to work as helper instead of as carman, then a junior man who continued to work as carman would gain on the veteran and perhaps pass him up in accumulated experience as carman. This, however, could not have happened if promotion was merely a matter of seniority.

The veterans are in essence attempting to convert a condition precedent into a condition subsequent. This position ignores the fact that under the contract which gives them whatever rights they may have to a carman's seniority, they were entitled to such seniority only upon the condition that they complete the prescribed period of on-the-job training and only upon condition that they elect "to acquire a seniority date of carmen **as of the ending date of the 1,040 days of service as such**" (R. 44). There was of course no obligation upon these veterans to elect to take a carman's seniority as of that date or any other date. They could have retained their helper's seniority, but having elected to take the carman's seniority they are bound by the provisions of the contract establishing their right to do so. They cannot have their cake and eat it, too. They must take the disadvantages with the advantages. If they elect a carman's seniority pursuant to the contract, they must elect to take it as of the date of completion of the 1,040 days of work experience. Nothing in the Act gives them a right to anything more. The veterans' seniority rights are subject to the nondiscriminatory provisions of the collective bargaining agreements creating such rights. As stated by this Court in **Aeronautical Lodge**:

> "Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other

instances it is effective only as from the qualifying date" (337 U. S. 521, 526).

The veterans here were accorded seniority as carmen in strict accordance with the provisions of the collective bargaining agreements (R. 100).

We should bear in mind the rights of other employees, as well as the rights of the veterans. In determining seniority we are dealing with an employee's rights to work as against fellow employees. Each of the other helpers who qualified for promotion to carman had to make the election as to whether he would relinquish his helper's seniority and go to the bottom of the carman's seniority list **as of the date he qualified.** The employees who so elected to give up their helper's seniority are not parties to this lawsuit and are not present to protect their interests. The respondent's motion to make them parties was denied (R. 2). If the veterans have a right to elect promotion retroactively, do these other carmen then have the retroactive right to change their mind about their election? And yet one or more of these men might lose his job if all veteran helpers are allowed retroactive seniority dates. If they had known that all veterans were to be placed ahead of them on the seniority list at some time in the future, perhaps they would have chosen to retain their helper's seniority where they were more secure.

Of course, every veteran would very much like to be able to make up all that he lost due to military service, but it is obviously impossible to resurrect the past and place every veteran in the same position with respect to employment as though he had never been in military service. Military service is a burden which most of the male population has had to bear at one time or another. Nearly all have suffered some loss on account of military service. These veterans have to stand some loss, too. The loss to

them is due to their inability to finish a required course of training until they were out of military service. While Congress has clearly given them the right to be restored to their previous position without loss of seniority, we submit that they have not been given the right to claim that they were skilled carmen before they actually earned that right.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the question presented at the beginning of this brief must be answered in the negative and the judgments of the Court of Appeals should therefore be affirmed.

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September, 1963.

APPENDIX.

Senate Report No. 1268, May 12, 1948, to Accompany S. 2655.

(U. S. Code, Congressional Service, 80th Congress, 2nd Session, 1948, Vol. 2, pp. 1989. 2003.)

VI. Section-by-Section Analysis.

Section 9. Separation from service; reemployment rights.

This section, which contains 11 subsections, is similar to, but not identical with, section 8 of the 1940 act. The committee has taken the position that, as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act. For that reason no important substantive changes have been made in the provisions of the 1940 act. Several procedural changes, which seem to be justified by past experience, have been introduced.

(a) Certificates of service; physical examinations.—This subsection re-enacts subsection 8 (a) of the 1940 act, except for changes in terminology necessary to conform to the terminology used in the National Security Act of 1947. It provides for the furnishing to those who complete satisfactorily their respective periods of service a certificate to that effect, and for their physical examination both at time of entry into service and at time of separation therefrom.

(b) Reemployment rights.—This subsection gives reemployment rights to persons who leave employment with either a private employer or the Federal Government and its agencies, and who receive a certificate of satisfactory

completion of service and make proper application for reemployment. If any such person left a position (other than a temporary position) in the employ of the Federal Government or its subdivisions, and is still qualified to perform the duties of such position, he would be restored thereto, or to another position with like seniority, status, and pay. However, if he were not qualified to perform the duties of such position by reason of disability sustained during his service, but was qualified to perform the duties of any other position, he would be entitled to be restored to the nearest similar position consistent with the circumstances in his case.

If any such person left a position in the employ of a private employer he would be entitled to similar reemployment rights as in the case of Federal employment, unless the private employer's circumstances had so changed as to make it impossible or unreasonable to restore him to the employment.

It is declared to be the intent of the Congress that, if any such person was in the employ of any State or political subdivision thereof, he should be given reemployment rights similar to those given to Federal Government employees hereunder.

The principal difference from the 1940 act is the provision giving a right to employment in the nearest similar position, the duties of which he can perform, to the person disqualified to perform the duties of his former position by reason of disability sustained during his period of service.

(c) Benefits which accrue to the individual during his absence. (1) Benefits to which entitled: This paragraph reenacts section 8 (c) of the 1940 act. It preserves certain benefits, incident to Federal or private employment, to which persons are restored after completion of service,

such as accumulated seniority rights and insurance benefits. In addition, the paragraph prohibits the individual's being discharged or laid off without cause within 1 year after restoration.

(2) Statement of policy regarding application of the "escalator principle": The provisions of this legislation differ from those contained in the Selective Training and Service Act of 1940, as amended, in that it is specifically stated to be the intent of the Congress that persons restored to Federal or private employment be restored so as to give them the status which they would have enjoyed if they had remained in such employment continuously during the time of their service in the armed forces.

Conference Report No. 2438, June 19, 1948, on the Selective Act of 1948.

(U. S. Code, Congressional Service, 80th Congress 2nd Session, 1948, Vol. 2, pp. 2011, 2016).

Statement of the Managers on the Part of the House.

Reemployment Rights.

The Senate bill provided that persons completing their periods of service under the act and securing restoration to their former positions in accordance with the terms of the act should be restored without loss of seniority. The bill contained a declaration by the Congress to the effect that persons so restored should be restored in such manner as to give them the status in their employment which they would have enjoyed if they had continued in their employment continuously. The Senate bill contained detailed provisions with respect to the enforcement of the reemployment rights of Federal Government employees and gave the Civil Service Commission the

power to issue necessary rules, regulations, and orders to assure that the restoration rights would be effective. It contained no specific provisions with respect to court proceedings for restoration to positions in the Federal Government. The Senate bill designated the Secretary of Labor, acting through the Bureau of Veterans Reemployment Rights, as the Federal official to render aid to veterans in obtaining restoration to their former employment. The bill also contained a provision authorizing and requesting the President to formulate and recommend to Congress plans for the rehabilitation and retraining of veterans serving after the date of enactment of the legislation.

The House bill provided that those restored to positions pursuant to the terms of the act should be entitled to all promotions, increases in pay, vacation rights and accumulations of seniority to which they would have been entitled if they had been working in their old positions during their periods of service. The House amendment, unlike the Senate bill, did not specifically prohibit the lay-off, within 1 year after his restoration, of a person restored to employment under the provisions of the legislation. The House amendment also contained detailed provisions with respect to the restoration to their positions of those veterans who held positions under the Federal Government prior to the beginning of their periods of service. These detailed provisions included specific authority for such persons to obtain court orders requiring their restoration to positions under the Federal Government. The House amendment designated the Director of Selective Service as the Federal official charged with the duty of rendering aid to veterans in obtaining restoration to their former positions.

The conference agreement adopts the language of the Senate bill with respect to reemployment rights, except

that (1) the provision of the Senate bill authorizing and requesting the President to formulate and recommend to Congress plans for the rehabilitation and retraining of veterans was eliminated, and (2) the provision of the House amendment deleting the prohibition against lay-offs of restored veterans was adopted.

House of Rep. Bill No. 6401,
80th Cong., 2d Session.

Union Calendar No. 909

80th Congress
2D Session

H. R. 6401
(Report No. 1881)

In the House of Representatives
April 30, 1948

Mr. Andrews of New York introduced the following bill; which was referred to the Committee on Armed Services May 7, 1948.

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed.

Sec. 8 (a) Any person inducted into the armed forces under this Act for service, who, in the judgment of those in authority over him, satisfactorily completes his period of service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of service, which shall include a record of any special proficiency or merit attained. The Secretaries of Army, Navy, or Air Force shall furnish to the Selective Service System hereafter established a report of separation for each

person separated from active duty. In addition, each such person who is inducted into the armed forces under this Act for service shall be given a physical examination upon separation and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: **Provided** That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes written application for reemployment within ninety days after he is relieved from such service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions or political subdivisions thereof, or the District of Columbia, such person shall be restored to such position or, if such position no longer exists, to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer or his successor in interest shall restore such person to such position, or, if such position no longer exists, to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be re-

stored to such position or, if such position no longer exists, to a position of like seniority, status, and pay.

(c) If any such person is not qualified to perform the duties of such position by reason of disability sustained during such period of service but is qualified to perform the duties of some other position, then, in the case of paragraphs (A) and (B) of subsection (b) he shall (and in the case of paragraph (C) of subsection (b) it is hereby declared the sense of Congress that he should) be employed at such other position as may provide the nearest possible similarity in seniority, status, and pay.

(d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, **shall be entitled to all promotions, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to which he would have been entitled had he been working for the employer during his period of service in the armed forces,** shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer, and shall not be laid off or discharged from such position without cause within one year after such restoration.

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b), subsection (c), or subsection (d), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions,

specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: **Provided**, that such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: **Provided**, That no fees or court costs shall be taxed against any person who may apply for such benefits: **Provided further**, That only the employer shall be deemed a necessary party to any such action.

Seniority and Promotion Rights of Reemployed Veterans.

Herbert L. Sherman, Jr.*

Although several landmark decisions concerning the reemployment rights of veterans under the Selective Training and Service Act of 1940[1] have been handed down by the United States Supreme Court, this area of the law

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[1] 54 Stat. 885 (1940), 50 U. S. C. A. App. § 301 et seq. (1951). A discussion of the relationship between seniority systems and the rights of veterans during the early days of the Act may be found in *Seniority and Re-employment Rights of War Veterans*, 54 Yale L. J. 417 (1945).

continues to be a fertile source of litigation. In recognition of this fact and anticapating a greater number of reemployment rights cases because of a reduction in the size of the armed forces, Congress increased its appropriation to the Bureau of Veterans Reemployment Rights of July 18, 1955.

Despite the lapse of fifteen years since the enactment of the basic statute, the courts are still plagued by such fundamental questions as how to measure the seniority credit of a returning veteran who had left his employment to serve in the armed forces, and whether a veteran, upon reemployment, may compel his employer to promote him to a different and higher ranking job than the position he formerly occupied if he might have been promoted had he not served in the armed forces. With the passage of time it will also become necessary for the courts to determine whether the Universal Military Training and Service Act of 1948,[2] whose language is substantially iden-

[2] 62 Stat. 604 (1948), 50 U. S. C. A. App. § 451 *et seq.* (1951). This statute, originally enacted as the Selective Service Act of 1948, was amended and renamed in 1951. It was also amended in 1950, 1953, and 1955.

According to the official answers to questions arising in connection with the Armed Forces Reserve Act of 1955, prepared by the House Committee on Armed Services, a three to six months trainee under that statute is likewise entitled to veterans' reemployment rights. See answer to Question 36. L. R. X. 5845. But in *Christner v. Poudre Valley Coop. Assn.*, 36 L. R. R. M. 2688 (1955), a federal district court in Colorado held that a reserve officer who returned from his annual training period cannot sue for reemployment in a federal court and through the local U. S. Attorney. The Court rules that the Universal Military Training and Service Act's provision permitting suits in the federal courts without meeting ordinary jurisdictional requirements is not available to reservists. It is indicated, however, that since the reservist's claim for reemployment arises under federal law, he could maintain an action in a federal court if the amount in controversy exceeds $3,000. The Justice Department plans to appeal the case since the decision may have an adverse effect on reservists training under the Armed Forces Reserve Act of 1955.

Since the court in the *Christner* case indicated that reservists performing training duty only were probably excluded from the

tical with that of the Selective Service and Training Act of 1940, was intended, because of an ambiguous additional provision, to provide any greater reemployment rights in these situations to veterans who qualify under that Act. The following discussion points up the impact of some of the most recent developments on the state of the law in connection with these troublesome issues.

(Discussion of Earlier Landmark Cases Omitted.)

The Diehl Case.

Facts: The most recent case to be decided by the United States Supreme Court on the question of measuring a veteran's seniority is **Diehl v. Lehigh Valley R. R.**[14] Diehl was employed as a car-man helper in June, 1942. Eight months later, on February 19, 1943, he was promoted to the job of "temporary car-man mechanic." He served on this job until he left for military service. From April 15, 1943, to October 20, 1945, Diehl was in the armed forces. On November 11, 1945, he was re-employed by the railroad as a "temporary car-man mechanic." In the meantime, the Union and the Railroad had agreed that the seniority rankings of incumbents of this job would be determined at the expiration of the war emergency.

On March 1, 1949, a supplemental agreement was reached by the Railroad and the Union. It provided as follows:

> "A car-man helper, who has qualified as a car-man mechanic . . . and is presently working on position

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operation of the law by inadvertence, amendments to the law that will correct the apparent oversight are under consideration, according to Secretary of Labor James P. Mitchell. However, amendment of the law may be unnecessary if the Tenth Circuit court of appeals finds that the present law *does* apply to reservists performing training duty only, as well as to reservists performing a period of extended active duty. 37 Lab. Rel. Rep. 5 (Nov. 7, 1955).

[14] 211 F. 2d 95 (3d Cir. 1954), *rev'd per curiam*, 348 U. S. 960 (1954).

> of a temporary car-man mechanic on the effective date of this Agreement, shall be given the opportunity to make an election within 15 days after the date of his being notified of having **worked 1160 days** as a temporary car-man mechanic to be placed on the permanent car-man mechanics' roster with seniority date as of the effective date of this agreement **in the order with other men in which he completed 1160 days' experience** . . . and if so electing shall forfeit his seniority as a car-man helper." (Emphasis added.)

Pursuant to the agreement Diehl was placed on the permanent car-man mechanics' seniority roster. Four individuals, however, were given higher rankings on the seniority roster than Diehl, who, by his suit, was seeking a higher seniority ranking than those of the four individuals. Diehl actually completed 1160 days on the mechanic's job on January 10, 1949. Without the interruption of his war service, he would have completed the required number of days June 1, 1946. The four individuals completed their 1160 days in the intervening period—after June 1, 1946, but before January 10, 1949.

These are the facts as set forth in the opinion of the Third Circuit court of appeals. In a per curiam decision the Supreme Court, in holding for the veteran, said:

> "Upon the facts disclosed in the opinion of the Court of Appeals for the Third Circuit, 211 F. 2d 95, the applicable Acts of Congress, and the opinion of this Court in Oakley v. Louisville & Nashville R. Co., 338 U. S. 278, the judgment of the Court of Appeals is reversed. Mr. Justice Reed dissents for the reasons given in the opinion of the Court of Appeals for the Third Circuit."

Analysis: The first significant point to be noted is that Diehl was already an incumbent of the higher position—

the car-man mechanic job—both when he left for military service and when the 1949 Agreement was reached, having been reassigned without dispute to that position upon his return from service. Upon his request for reemployment with the Company, an interesting question could have arisen. Since he was labeled a "temporary" car-man mechanic when he left for service (despite the fact that he was regularly assigned to this position for almost two months before entering the service and for several years after his return), should section 8 (b) of the 1940 Act, when it speaks of restoration to a position "other than a temporary position," be held to mean that Diehl was not entitled to be restored to the "temporary" car-man mechanic job? Or is this statutory language directed at an entirely different problem, that of whether the very employment relationship itself was merely temporary? The latter problem was the central issue in the **Venzel** case, considered *supra*, and is clearly distinguishable from the factual situation presented by the **Diehl** case where the employment relationship was clearly not temporary. If the quoted language of section 8 (b) is confined in its application to the question of the **Venzel** case (whether the employment relationship is probationary), it has no bearing on the **Diehl** case situation, and Diehl could have been held entitled to the job which he apparently was filling regularly in practice when he left. And if the quoted language is applicable to the **Diehl** case situation, it could be held that he was still entitled to this job on the ground that neither it, nor his relationship with it, nor his whole employment relationship was in fact "temporary."

In any event, Diehl was "restored" to the "position" which he left. Thus, it was unnecessary for the Court to determine which of several possible bases should be accepted as supporting the premise that Diehl was properly reassigned to the job he actually held when he left for mili-

tary service. The issue had become moot by the actions of the parties. And Diehl had no basis for complaining of his seniority status at this time, since there was still pending an agreement of the Union and the Railroad that the seniority rights of incumbents of the "temporary car-man mechanic job" would be determined at the expiration of the war emergency. Moreover, since he was placed on the permanent car-man mechanics' roster under the terms of the 1949 agreement, the only remaining question involved his seniority status in his assigned job in the light of this agreement. His "position," when he left for military service, under the realities of the situation, was that of car-man mechanic. The word "temporary," as used in the March 1, 1949, agreement, seems to mean only that passage of a certain amount of time would qualify an incumbent for a place on the permanent seniority roster for car-man-mechanics. It does not appear, for example, that incumbents were actually on a probationary status, *e. g.*, that they could be removed or downgraded without cause. Nor were they merely filling an occasional turn when "permanent" car-man mechanics were unavailable. It further appears that they were receiving the rate of pay for car-man mechanics.

It may be argued that the Supreme Court accepted and followed the agreement of the Union and the Railroad to some extent, but rejected it in part—to the extent that the agreement failed to recognize that veterans would have completed 1160 days much earlier had it not been for military service. This would be consistent with earlier statements that even an agreement between a Union and a Company cannot validly discriminate against veterans as a class. The Court obviously followed the agreement to the extent that Diehl was placed on the permanent car-man mechanics' seniority roster by virtue of this supplemental contract. Although this part of the agreement and

the effective date of Diehl's seniority, the date of the contract, are apparently accepted by the Court, the language "in the order with other men in which he completed 1160 days' **experience**" is not **literally** followed. Since Diehl did not gain 1160 days of **experience as a car-man mechanic** while he was in the armed forces, it may be argued that the Court rejected part of the agreement.

On the other hand, the Court may not have intended to reject any part of the agreement, but merely to construe it in a practical manner. Since the arguments before the Court indicate that the relative experience of the men on the seniority roster was unimportant, it is proper to read "1160 days' experience" as meaning only "1160 days of work," or even merely as the elapse of "1160 working days." To attribute the suggested meaning to "1160 days' experience" would not only be consistent with other parts of the 1949 agreement, but also with the practice in the railroad industry to consider length of service as virtually controlling.[15] Relative skill and ability, stressed in many other industries, is given little consideration in the railroad industry.

If that is the proper construction of the agreement and mere passage of time is all that is required to qualify an employee for the higher ranking on the seniority roster, the dictum in the **Oakley** case clearly points to the result reached by the Court. Substitution of military service for "days of work" for purposes of determining seniority standing is then required by both the **Fishgold** and the **Oakley** cases. The "continuous employment" standard is set forth by the Court in its discussion of other landmark

[15] In the course of a debate on the bill in the House, Congressman May indicated that one of the chief purposes of the statute was to preserve seniority rights of the railroad workers. 86 Cong. Rec. 11702 (1940).

cases dealing with the seniority rights of veterans. It reads as follows:[16]

> "We stated, in effect (in Fishgold v. Sullivan Drydock & Repair Corp.) that an honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent to that which he had left when he joined the Armed Forces, but rather to a position which, **on the moving escalator of terms and conditions affecting that particular employment**, would be comparable to the position which he would have held **if he had remained continuously in his civilian employment.**" (Emphasis added.)

Upon the basis of this analysis it is submitted that the **Diehl** case was rightly decided, and further, that the Court, in its one sentence majority opinion, did not feel compelled to do more than apply well-settled principles to the very narrow issue of whether time spent in military service should be counted toward giving Diehl a higher seniority ranking.

Crucial to a true understanding of the case are certain developments which took place when the case reached the Supreme Court. Although the Railroad had won in the Third Circuit, it assigned all of its argument time to counsel for the Union[17] which had intervened in the case. And counsel for the Union, as a practical matter, eliminated the "experience" of Diehl from consideration in the case.

When the Chief Justice asked whether the Union contended that the other four men were given higher ranking

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[16] Oakley v. Louisville & Nashville R. R., 338 U. S. at 283. Noted in 18 Geo. Wash. L. Rev. 277 (1950).

[17] The Union, System Federation No. 96 of AFL's Railway Employees' Department, intervened in the case as defendant-respondent.

on the seniority roster because they had more experience, the Union attorney conceded that this was not the reason for the intervention of the Union in the case. The Chief Justice then noted that a man who came to the Lehigh Valley Railroad with 25 years of mechanic's experience on another railroad would get no seniority credit for that experience under the 1949 agreement in question. And the Union attorney agreed that he was not interested in classifying people on the basis of greater or lesser experience, but only in an orderly administration of the contract. On the other hand, counsel for Diehl stressed that under the 1949 agreement mere completion of 1160 days of work was sufficient, as a practical matter, to qualify an incumbent of the "temporary car-man mechanic" job for his proper place on the seniority roster. He further asserted that some railroads had done exactly what Diehl was seeking. The Lehigh Valley Railroad reserved no time for presenting its arguments. And the Justice Department in an amicus brief stated that it agreed with Diehl's position.[18]

It is not surprising, therefore, that the Supreme Court found it possible to dismiss this case in a brief per curiam decision. But what did it actually hold? Simply that a veteran is entitled to count military service toward his seniority credit, where the seniority ranking of incumbents of the job to which the returning veteran is restored is dependent upon routine completion of a certain number of workdays, so that his position on the "seniority escalator" will not suffer because of service in the armed forces. Once the case is considered as presenting only that narrow issue, the result is easy under the **Fishgold** and **Oakley** cases.

As a postscript, it should be noted that the opinion of the Third Circuit court of appeals in this case may also

[18] See 35 Lab. Rel. Rep. 410 (1955).

have encouraged reversal of its decision when it states that the dictum of the Supreme Court in the **Oakley** case, quoted supra, cannot be reconciled with the provisions of the controlling statutes. The Third Circuit states:[19]

> "But if we apply literally the test supplied by Oakley we must advance Diehl above the four individual appellees for only so will his position become comparable to that 'which he would have held if he had remained continuously in his civilian employment.' If we adopt this course we must disregard the provisions of Section 8 (c) of the Selective Training and Service Act and of the Selective Service Act of 1948 (the Universal Military Training and Service Act) which provide that the returning veterans 'shall be considered as having been on furlough or leave of absence.' . . . There is a very palpable difference between 'furlough' and 'leave of absence' and 'continuous employment.' If we . . . apply literally the interpretation of Section 8 (c) of the Selective Training and Service Act in the Oakley case, we must treat 'on furlough' and 'leave of absence' as the equivalent of 'continuous employment.'
>
> "We cannot reconcile the irreconcilable."

The Third Circuit then goes on to apply what it calls the express language of the statute. It holds against Diehl despite the absence of any issue as to Diehl's qualifications to perform the work and the absence of any practical problem in this case by application of the "continuous employment" standard of the **Oakley** case. The decision of the Third Circuit was based mainly on a supposed theoretical dilemma, which resulted in accusing the Supreme Court of failure to read the statute correctly in determining Congressional intent. This situation was hardly conducive to the attempt of the Railroad and the Union to secure affirmance of this decision.

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[19] 211 F. 2d at 99.

Significance of the Diehl Case.

To attribute substantial significance to the one sentence majority opinion of the Supreme Court is unwarranted. It probably only reaffirms the prior statements of the Court in the **Oakley** case. When they are taken in context, these statements emphasize that the escalator principle must be applied to grant the veteran such fixed and certain benefits as the veteran would have attained by continuous employment. Obvious examples are seniority credit and benefits automatically flowing from seniority status. The decision in the **Diehl** case cannot be considered as controlling, by necessary implication, other questions of veteran rights. Thus the suggestions of the Solicitor of Labor to the contrary, as contained in an eight page analysis of the **Diehl** case submitted to the Bureau of Veterans' Reemployment Rights, cannot be accepted.[20]

On Furlough or Leave of Absence: Does the decision render meaningless the "furlough or leave of absence" provisions of section 8 (c) of the Selective Training and Service Act of 1940 or its counterpart, section 9 (c) (1) of the Universal Military Training and Service Act? It is submitted that the decision does no such thing, and further, that these provisions can be reconciled, contrary to the position of the Third Circuit, with the "continuous employment" standard of the Supreme Court.

Sections 8 (c) and 9 (c) (1) of the two statutes in question are identical. The crucial part reads:

> Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of

[20] Undated Memorandum from Solicitor of Labor to Robert K. Salvers, Director, Bureau of Veterans' Reemployment Rights, analyzing the *Diehl* case.

training and service in the land or naval forces, shall be so restored without loss of seniority. . . .

Insofar as the Supreme Court merely applies its "continuous employment" standard to the question of measuring the seniority credit of a veteran, it is simply and properly giving greater weight to the more specific Congressional language ("without loss of seniority") than it is to the more general statutory language ("shall be considered as having been on furlough or leave of absence"). If there is any conflict between these two provisions, the Court, under well-accepted principles of statutory construction, must consider the more specific provision as controlling.

It would seem, then, that by virtue of the "without loss of seniority" provision a veteran is entitled to seniority credit for time spent in the armed forces and any benefit which is an automatic consequence, pursuant to custom or the terms of a collective bargaining agreement, of his seniority status. And the "furlough or leave of absence" provisions of the statute are not intended to detract from the seniority or other related and fixed rights of the veteran.

This does not mean, however, that these provisions of the statute are to be ignored. In areas other than seniority credit and automatically attendant benefits, the "furlough or leave of absence" provisions should be considered as part of the "continuous employment" standard. It would seem clear that an employee may remain continuously in the employment of his employer, yet be on furlough or leave of absence. The concepts are not inconsistent. Where questions other than arithmetical calculation of seniority credit or automatic layoffs and promotions based solely on length of service are involved, the courts may properly consider the furlough or leave of absence provisions of the employer as a basis for deny-

ing benefits claimed by the veteran. An obvious example is where the veteran claims that service in the armed forces should be substituted for the necessary experience in a lower rated job to qualify for a higher paying job.

Statutory Protection Beyond One Year: Another interesting aspect of the **Diehl** case is the dates that were involved. Diehl was restored to his former position in November, 1945. Over three years later, the agreement of March 1, 1949 was consummated.

By granting Diehl, as of 1949, the seniority ranking he would have had if not absent in military service, the Court apparently decided that statutory protection still exists, with respect to seniority rights, for at least three years after reinstatment. But again, this principle is not startling, since it had already been held in the **Oakley** case that a veteran's seniority rights are entitled to statutory protection beyond the first year after re-employment. In this respect the Court in the **Diehl** case was also following another well established principle.

One note of caution, however, should be added. While Diehl was still in the armed forces, an agreement, dated August 29, 1944, was reached by the Union and the Company. This agreement provided that the seniority rights of "temporary car-man mechanics" would be determined at the end of the war emergency. During the period between restoration of Diehl to his former job and the agreement of March 1, 1949, this agreement was still pending. Whether the Court would have extended statutory protection beyond three years after reinstatement in the absence of such an agreement is, of course, uncertain.

Effect of Diehl Case on Prior State of the Law.

It is doubtful whether the Supreme Court intended, by its short per curiam decision, to make any change

in the previously existing body of law, except of course to overrule the decision of the Third Circuit in that case. If it had intended to make any significant change in the basic principles which have been developed by the courts, it certainly should have engaged in some sort of helpful analysis which would provide guidance for the lower federal courts in future cases. At least more than one sentence from the Supreme Court should be required for the various courts of appeals to find that any substantial portion of the prior case law has been overruled. Nevertheless, since the Bureau of Veterans' Reemployment Rights has been advised that its previously asserted positions in this area of the law have been reinforced by the **Diehl** case (despite frequent refusals of the courts to adopt the sweeping positions of the Government in seeking relief in behalf of veterans),[21] an analysis of the impact of the **Diehl** case on the principles set forth in leading decisions of the courts of appeals is in order.

At the outset it must be emphasized that two basic distinctions should be kept in mind. First, it should be recognized that different considerations are involved in the situation where a veteran is restored to the position that he left and is merely seeking **seniority credit** for time spent in the armed forces, and the situation where the veteran claims that he has been improperly denied a **higher ranking job** than the one he left for military service. And secondly, a distinction between the situation where a veteran would have obtained a benefit as an "automatic right," and the situation where it is merely

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[21] U. S. Bureau of Veterans' Reemployment Rights, Reemployment Rights Handbook (October 1954), is not completely in accord with the leading decisions of the Courts of Appeal, which deal with veterans' promotion rights. See pp. 85-86. It appears that the Bureau is setting forth in its handbook the positions which it has taken as an adversary in litigation, but which most of the courts have refused to accept when dealing with promotion rights.

conjectural whether the veteran would have obtained the benefit, should be kept in mind.

Many of the actual cases which have come before the courts of appeals have involved only the question of measuring the seniority credit of a veteran. He is not claiming damages because he has been improperly denied advancement to a higher position, but only that he has not been given credit for service in the armed forces. Very few cases have actually required the courts to rule on the right of the veteran to a higher job. But both the majority of the circuit courts of appeal that have been directly confronted with this question, and the majority of those which have passed on this question in dicta, have denied relief to the veteran unless he can show that he would have attained the higher job as a matter of automatic right, either by custom or contract, on the sole basis of length of service.[22] When promotion under a collective bargaining agreement is uncertain and dependent upon qualifications (such as demonstrated, requisite skill and ability) over and above mere length of service, the returning veteran is not entitled, under the applicable statutes, to the higher position. His employer is not required by law to speculate as to whether the veteran would have had the requisite skill and ability at the time of the vacancy in the higher position, or whether the veteran would have had greater skill and ability than other employees who might have bid upon the job.

The following collection of quotations from leading decisions of the various courts of appeals demonstrates

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[22] *E. g.*, Raulins v. Memphis Union Station Co., 168 F. 2d 466 (6th Cir. 1948); Gregory v. Louisville & N. R. R., 191 F. 2d 856 (6th Cir. 1951); Hewitt v. System Federation, 161 F. 2d 545 (7th Cir. 1947).

their strong endorsement of these principles for the past seven years.

(This collection of quotations omitted.)

Different Types of Promotion Clauses.

The Supreme Court has stressed that the applicable statutes use the term "senority" without definition. It has, therefore, concluded that "Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining," and that the Court "must look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran."[31] Hence it is important to note that there are varying types of clauses and practices which determine the relationship between seniority and promotions.

One type of clause or practice grants promotions based on length of service alone. Relative skill and ability of those bidding on the job are not deemed important. Mere passage of time qualifies the applicant for the additional benefits. Where such a contract or practice is shown, the courts should grant a returning veteran a higher rated job where he would have attained it if it were not for service in the armed forces.

A second type of contract clause or practice specifically gives the employee with the highest seniority, who bids on the higher job when it is vacant, a trial period—an opportunity to learn to perform the job, regardless of his existing ability to perform the job. Again, if the returning veteran missed the opportunity only because of military duty, he should be given, upon his return,

[31] Aeronautical Lodge 727 v. Campbell, 337 U. S. 521, 526 (1949).

the trial specifically provided for by the practice or the agreement of the Union and the Company. The veteran should not be denied the opportunity for the reason that he was absent in the armed forces when the vacancy occurred, because here the right to a trial under the contract is an automatic incident of his seniority status. Under the "continuous employment" doctrine of the **Oakley** case, and the "without loss of seniority" provisions of the statutes, the veteran's absence at the time of the vacancy should be excused in this situation.

At the opposite pole from that of automatic right to a promotion based on length of service is the situation where management has complete discretion to promote anyone it sees fit at any time. Here the veteran can claim no "right" to a higher job than the one he left when he entered the service. It should be noted that many agreements make seniority an important factor with respect to layoffs, but not as to promotions.

A fourth type of clause in a collective bargaining agreement makes promotions dependent upon the relative skill, ability, and physical fitness of those who bid upon the higher job. Only if these factors are relatively equal does length of service govern. Under this type of clause seniority and promotion are clearly separable. In fact, it is not even a hybrid, since length of service is not relevant until other crucial determinations are made. This situation is clearly distinguishable from those noted above. That the distinction has merit is indicated by the questions addressed to the counsel for the Union in the **Diehl** case.[32]

Although the courts should not invoke the "furlough or leave of absence" provisions of the applicable statutes

[32] The Chief Justice wanted to know whether the parties were interested in classifying people on the basis of experience.

to deny seniority credit for time spent in the armed forces, or even to deny a benefit which is an automatic incident of seniority (such as promotion based on length of service alone), it is not inappropriate, along with other reasons which may be advanced to support the usual result, to apply these provisions to a situation when promotion is dependent upon relative skill and ability. If the "continuous employment" standard as stated in the **Oakley** case were to be applied to conjectural benefits, then the parties, Union and Company, would be literally required to guess how much skill would have been acquired on the job and to determine whether the veteran would have had greater skill and ability than his successor at the time of the opening on the higher job while he was in the armed forces. Such impossible decisions have not yet been required of Companies and Unions by the courts. Nor is there any reason to suppose that the Supreme Court would adopt such a position if confronted with the issue.

On the other hand, not much would be accomplished by comparing the experience, skill and ability of the veteran at the time he seeks reemployment with that of the employee who has attaind the higher job during the veteran's absence and has been serving in it in the meantime. This merely results in an unfavorable comparison of the veteran's experience and abilities.

The 1954 **Handbook of the Bureau of Veterans' Reemployment Rights** contains the following question and answer:[33]

"Q. Where promotions are made on the basis of seniority, ability, and fitness, and seniority governs as between employees when other factors are equal,

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[33] P. 85.

to what position would an ex-serviceman be entitled upon reinstatement?

"A. If it is shown that he possesses the requisite ability and fitness, he should receive the top position to which a junior employee was promoted during his absence. His seniority in the higher position would be computed as if he had been promoted just ahead of the junior employee. The burden of showing he has the necessary ability is on the ex-serviceman. The burden of showing he is not physically fit is on the employer."

One very serious objection to the Bureau's suggested solution, if the basis for promotions is contained in a collective bargaining agreement, is that the Bureau is rewriting the contract for the parties. There is a well-recognized distinction in industry between a standard which entitles the applicant with the greatest seniority to a vacancy in a higher job merely upon a showing that he is capable of performing the job, and a standard which entitles that applicant to the job only if his skill, ability and physical fitness are relatively equal with that of other applicants. The question in the **Handbook** assumes the latter standard, yet applies the former standard as a solution to the problem. The same objection of changing the mutually agreed to standards is inherent in a solution which would provide a trial period for the veteran to demonstrate his proficiency in the higher job. It must be remembered that Congress did not intend to provide for any greater gains on the "seniority escalator" than the veteran would have had if he had remained in his employment.

Where the contract or custom calls for an automatic promotion or trial period, all serious speculation is removed. Once the principle is decided, application of it is relatively easy. The same is true with respect to the

arithmetical computation of seniority credits. But where the standard for promotion involves relative experience, skill, ability and physical fitness, the problem is much more complex. If the courts grant the returning veteran whatever rights he would have had if he had not served in the armed forces, it is clear that the veteran is only entitled to restoration to his former job with accumulated seniority. This is so, since the necessary speculations would prevent the veteran from showing with any degree of assurance what would have happened had he remained in his employment. Too many judgments on intangible qualities and uncertain circumstances would be involved.

Also, for the courts to require Unions and Companies, in the administration of their collective bargaining agreements, to engage in such speculations upon the veteran's return would provoke unwarranted disharmony in their relationship. Such a holding would encourage the filing of grievances, because of the indefiniteness of the situation. Even if the courts were to settle the date on which the evaluation of relative skills, etc. should be made, the employer would be required to make the necessary determinations with the risk of being charged that he has exercised poor judgment. He might then be faced with claims for back pay by whichever employee lost the higher job. Such policy considerations as these lend support to the view that the veteran must be able to point to something more definite in the contract or practices of his employer than a "relative skill and ability" clause to maintain successfully his claim for greater benefits.

A still further type of clause in a collective bargaining agreement involves the progression of an apprentice to the status of journeyman in a trade or craft job. Although the contract may merely refer to a certain number of hours of work as an apprentice to qualify as a journeyman, it would seem that the real inquiry should be

whether the experience on the job or mere passage of time is the controlling element. If counsel for the veteran and counsel for the Company and Union agree that mere passage of time is sufficient to qualify an employee for a higher status, as was the position of counsel, in effect, in the **Diehl** case in arguing before the Supreme Court, then the court should clearly rule that service in the armed forces may be substituted for service in the plant. On the other hand, where experience on the job is the gist of the practice and the contractual requirement, the courts should not substitute military service for the necessary experience. By deciding the **Diehl** case in one sentence, the Supreme Court would seem to have left prior law on this question undisturbed.

Effect of Section 9 (c) (2) of the 1948 Act.

All of the cases discussed *supra* arose under the provisions of the Selective Training and Service Act of 1940. Neither the United States Supreme Court nor any Court of Appeals has yet been required to determine whether a veteran inducted under the Universal Military Training and Service Act of 1948, as amended, has any greater seniority or promotion rights than veterans covered by the 1940 Act. Since the question has been raised, however, in cases which did not require any ruling on that precise issue,[34] it is safe to assume that in time the courts will find it necessary to reach a decision on this point.

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[34] In Addison v. Tennessee Coal, Iron & Railroad Co., 204 F. 2d 340, 342 (5th Cir. 1953), the court said:

> "Neither do we find, as confidently urged by appellant, that the language of 9 (c) (2) [*sic*] of the Selective Service Act of 1948, is effective as a legislative construction of the former Act, and requires, in this case, the application of different principles than those above referred to."

And in *Nevins v. Curtis-Wright Corp.*, 172 F. 2d 535 (6th Cir. 1949), the court merely stated that the 1948 Act is not retroactive in its effect.

While the language of Section 9 (c) (1) of the 1948 Act concerning the re-employment rights of veterans is the same as that found in the earlier Act, as amended, a further provision was added. Section 9 (c) (2) reads:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraphs (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.[35]

The only opinion which contains any extensive analysis of this section of the statute is that of the Third Circuit Court of Appeals in **Diehl v. Lehigh Valley R. Co.**[36] In that case Chief Judge Biggs comes to the conclusion that the 1948 Act cannot be considered as granting any greater seniority rights to returning veterans than were already granted under the 1940 Act and Section 9 (c) (1) of the 1948 Act. In reaching this conclusion, however, the court first notes the similarity of the language employed by the Supreme Court in the **Oakley** case to that used in section 9 (c) (2). It then decides that the "continuous employment" standard of section 9 (c) (2) and the **Oakley** case is irreconcilable with section 9 (c) (1) of the 1948

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[35] *Boone v. Fort Worth & Denver Ry.*, 223 F. 2d 766 (5th Cir. 1955), quotes this section, but the opinion contains no analysis as to whether a veteran has greater reemployment rights by virtue of this section in the Universal Military Training and Service Act. The case merely holds that a railway telegrapher was not restored to an inferior position or one of different status when the only difference in his former position and that obtained by him after service was in the shift to which he was assigned.

[36] 211 F. 2d 95 (3d Cir. 1954).

Act and its counterpart in the 1940 Act.[37] The court says:[38]

> "We cannot reconcile the irreconcilable. Congressional intent as expressed in the actual words of a statute must, we think, be held paramount to an express Congressional interpretation of that statute even in an immediately following clause."

It is submitted that the court's reasoning is fallacious because it assumes that the "continuous employment" standard of the **Oakley** case and section 9 (c) (2) is irreconcilable with the "on furlough or leave of absence" provisions of the two statutes. Reconciliation is, however, both possible and proper, as indicated *supra* in the discussion of the "on furlough or leave of absence" provisions.

On the other hand, it is submitted that the conclusion that the 1948 Act grants no greater seniority or promotion rights to returning veterans is correct. A considerable amount of evidence may be marshalled to support this position.

In arguing before the Supreme Court in the **Diehl** case, counsel agreed that the case was governed by the 1940 Act. Counsel for the Union, however, added that section 9 (c) (2) of the 1948 Act was merely precatory rather than mandatory, while counsel for the veteran argued that Congress in the 1948 Act adopted the Court's "continuous employment" doctrine under the 1940 Act. Hence, he contended that the doctrine should be followed in this case. Justice Burton then suggested that section 9 (c)

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[37] Since the *Diehl* case actually arose under the Selective Training and Service Act of 1940, the Court's observations as to section 9 (c) (2) of the 1948 Act were unnecessary.

[38] 211 F. 2d at 99.

(2) of the 1948 Act might be a declaration of what Congress had meant all the time.[39] If so, no additional rights were intended to be conferred by Congress in adopting this section.

There is further evidence to support the position that Congress did not intend, by virtue of this section, to grant any greater reemployment rights to veterans who qualify under the 1948 Act. The Senate Report,[40] in commenting upon section 9, refers to section 9 (c) (2) as a "statement of policy regarding application of the 'escalator principle,'" and goes on to state that:

> "This section, which contains 11 subsections, is similar to, but not identical with, section 8 of the 1940 Act. The committee has taken the position that, as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 Act. **For that reason no important substantive changes have been made in the provisions of the 1940 Act.** Several procedural changes, which seem to be justified by past experience, have been introduced." (Emphasis added.)

In addition, the Conference Report[41] on the 1948 Act shows that the specific language of the House bill, which granted promotions and accumulations of seniority to veterans to which they would have been entitled if they had been employed continuously, was rejected in favor of the more general policy statement contained in section 9

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[39] See 35 Lab. Rel. Rep. 410 (1955).

[40] S. Rep. No. 1268, 80th Cong., 2d Sess. 15-16 (1948).

[41] H. R. Rep. No. 2438, 80th Cong., 2d Sess. 40 (1948).

(c) (2). A further hint as to Congressional thinking on this matter may be gleaned from the reports on the 1951 amendment. In the Conference Report, it is stated that "existing law permits returning service personnel to be restored to the same position previously held or to a position of like seniority, status, and pay."[42] It is clear that Congress did not believe that the 1948 Act had granted greater seniority and promotion rights to veterans under that Act than those already enjoyed by veterans under the 1940 Act.

Still further evidence that no change in the existing law was intended by the 1948 Act is found by reference to section 9 (d), the enforcement provision. No provision is made for enforcement of section 9 (c) (2). Paragraph (d) reads in part as follows:

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) **or subsection (c) (1)**, the district court. . . ." (Emphasis added.)

If Congress had intended to effect an important substantive change by adoption of section 9 (c) (2), it would have provided specifically for its enforcement as such.

Conclusion.

Although there is respectable opinion to the contrary, it is here concluded that the **Diehl** case has added nothing to the existing body of law with respect to the reemployment rights of veterans. The courts of appeals are free to continue to apply well-established principles governing seniority and promotion rights of returning veterans. No reappraisal of the previously existing body of law on these questions is necessary, at least until the United States

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[42] H. R. Rep. No. 535, 82d Cong., 1st Sess. 22 (1951).

Supreme Court speaks more affirmatively than it has to date.

The provisions of section 9 (c) (1) of the Universal Military Training and Service Act can be reconciled with the **Oakley** case and section 9 (c) (2). And finally it must be concluded that section 9 (c) (2) grants no greater rights to veterans who qualify under the Universal Military Training and Service Act than those enjoyed by veterans who qualified under the Selective Training and Service Act of 1940.